ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of	)	
	)	MM Docket No. 92-259
	)	
Implementation of the Cable	)	
Consumer Protection and Competition	)	
Act of 1992	)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF
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SUMMARY

The Commission should move promptly to adopt rules which will allow broadcasters and multichannel video distributors to move into new relationships. In particular, it is important that the must carry requirements for cable systems be fully in place and effective well before stations are required to make an election between those rights and retransmission consent.

The Commission should avoid, however, attempting to accomplish more in this necessarily truncated proceeding than Congress expected, or which is reasonably likely to lead to useful results. The most important goal of this proceeding is to begin compliance with the Cable Act, and dealing with some more sophisticated questions about the new video environment should await other proceedings.

Regarding questions raised about the definition of a local commercial television station, if a given *community* is located in whole or in part within a station's local market, the cable systems serving that *community* should be required to carry all must carry stations within the market in which that community is located. The location of the system's principal headend is simply irrelevant, as is the cable operator's decision as to how it has chosen technically to integrate its systems.

Changes in ADI configurations should be considered in the context of the more global question of how to fashion the triennial must carry/retransmission consent election process.

NAB concurs with the Commission's initial assessment that the simplified special relief provisions of Section 76.7 would generally satisfy the Act's mandate that

such requests to add or delete communities from a station's market receive expeditious consideration. In considering such "community waiver" petitions, any Commission-imposed mileage limitation that would create a presumption against a community being considered as part of a station's local market would violate the Act. Congress has also rejected over-the-air viewability as a dispositive factor in determining must carry status.

Updating the Section 76.51 list through wholesale adoption of Arbitron market designations, and more particularly the manner in which Arbitron chooses to hyphenate communities in a market, would not be prudent. The 76.51 list should be updated in three year cycles to coincide with the retransmission consent/must carry election process. Moreover, there is merit to expanding the 76.51 list beyond the top 100 markets. NAB counsels strongly *against* considering revisions to the geographic limitations of the program exclusivity rules in the context of updating the 76.51 list at this time.

The Commission has recognized the benefits to consumers of signal enhancements, such as ghost canceling, carried over the VBI of a television signal. The Commission should establish rules that ensure that cable systems treat these signal enhancements as to maximize their effectiveness to subscribers. Further, as cable systems are reconfigured, system operators should be required to include in their plans the obligation to carry material on subcarriers or in the VBI.

In resolving channel positioning conflicts, any scheme whereby *cable operators* would be permitted unilaterally to select a station's channel position from among

the statutory options, should be rejected as being directly contrary to the Act. There is also absolutely no support in the Act for the suggestion that stations be entitled to their over-the-air channel position only when that position is encompassed by the basic service tier on a cable system.

Regarding cable operators' rights to receive compensation in connection with a station's delivering a good quality to the cable system's headend, the first element must be a requirement that cable operators employ good engineering practices and take all reasonable steps necessary to extract the highest quality signal available over-the-air. After the effective date of the new rules, cable operators should notify any otherwise must carry eligible station of the cable system's claim that the station fails to comply with the good quality signal requirement.

As for procedures associated with the distant signal copyright indemnification requirement, regulations should be adopted for a payment system that will both accurately reflect the cable royalty structure and leave any disputes arising under stations' indemnification agreements for resolution by the courts. With respect to remedies, no time limit on the filing of carriage complaints should be imposed.

Regarding the definition of multichannel video programming distributor. NAB agrees that the requirement of obtaining retransmission consent should fall upon the entity providing the broadcast signal to the consumer. Thus, as the Commission suggests, providers of capacity or transmission services to other entities which in turn distribute broadcast signals to consumers should not be subject to obtaining retransmission consent.

The language of the Act clearly applies to retransmission of any broadcast station's signal, including the signal of radio stations. That is not only the unambiguous language of the 1992 Act; it is also consistent with Congress' purpose in eliminating an exception to the general retransmission consent provision already in section 325 of the Communications Act.

The *Notice* describes the exceptions contained in new section 325(b)(2) to the requirement that multichannel video programming distributors obtain consent from the broadcasting stations whose signals they retransmit. NAB suggests that, at this initial stage, the Commission adopt rules which restate the retransmission consent requirement and the statutory limitations and establish a simple procedure for dealing with complaints about unauthorized retransmission.

NAB recommends establishing an August 2, 1993 deadline for stations to elect between must carry and retransmission consent. Stations failing to make an election by the August 2, 1993 deadline should be presumed to have elected must carry on the channel on which they are then being carried. The Commission asks for comment on the interplay between retransmission consent and the cable compulsory license in connection with its setting up procedures implementing the election of retransmission consent status by broadcasters otherwise entitled to mandatory carriage. It appears preferable for the Commission to schedule triennial elections to coincide with the semi-annual accounting periods established by the Copyright Office.

The Commission's proposal that none of the provisions of section 614 apply to retransmission consent stations, ignores a critical distinction in the language Congress

used in the Cable Act. That distinction makes clear that "cherry-picking" of *all* broadcast signals by cable systems is prohibited. The rules which the Commission adopts, therefore, should provide that the requirement to carry the entire program schedule applies equally to stations carried pursuant to must carry and retransmission consent.

In dealing with situations in which a station's must carry election is not honored initially, but subsequently the station is approached by a cable system in its local market wanting to carry its signal, the station whose must carry election is not honored *automatically* regains its retransmission consent rights with respect to the relevant cable system.

The Commission mistakenly believes that there should be a connection between its retransmission consent rules and program exhibition rights under the Copyright Act. Clearly, no such nexus exists. Congress' clear intent was that issues relating to the retransmission consent provisions of the *Communications Act* relating to a station's signal should be regulated by the Commission, but that any copyright issues are, and should remain, within the province of the cable compulsory license. Stations should not be required to make any showing concerning their program contracts in order to exercise retransmission consent.

NAB concurs with the Commission's determination that issues relating to the impact of retransmission consent on cable rates should be resolved in the pending rate-making proceeding.

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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1/] hereby responds to the Notice of Proposed Rule Making ("*Notice*") in this proceeding.

I. INTRODUCTION

NAB applauds the efforts of the Commission and its staff to meet the deadlines Congress included in the Cable Act for the adoption of detailed rules to implement the Act's requirements. The *Notice* is the product of substantial effort and careful thought by the Commission about the issues created by the must carry and retransmission consent provisions of the Act. The Commission should move promptly to adopt rules which will allow broadcasters and multichannel video distributors to move into new relationships. In particular, it is important that the must carry requirements for

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1/ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks which serves and represents the American broadcast industry.

cable systems be fully in place and effective well before stations are required to make an election between those rights and retransmission consent.

The Commission should avoid, however, attempting to accomplish more in this necessarily truncated proceeding than Congress expected, or which is reasonably likely to lead to useful results. The most important goal of this proceeding is to begin compliance with the Cable Act, and dealing with some more sophisticated questions about the new video environment should await other proceedings. NAB is concerned that the *Notice* in some places takes up consideration of issues which seem to be removed from the narrow task of implementing the new law. The Commission in several places asks whether other rules, which *might* be affected by the adoption of must carry or retransmission consent provisions, should be amended in this proceeding. In other places, the Commission asks for comments on ways it may be able to establish *a priori* rules governing adjudicatory proceedings it will be faced with under the Act. Finally, the Commission engages in speculation concerning the interaction between retransmission consent and the copyright laws.

None of these matters should be taken up in this proceeding. It is impossible for the Commission to predict accurately how certain provisions will work in practice, particularly given the wide variation in television markets. The Commission should gain some experience before attempting to resolve all issues in its rules. Other rules can be amended when the impact of the Cable Act in practice can be appreciated, and the Commission of course has the authority to craft waivers of its rules in the interim if they prove to be needed.

As NAB discusses *infra*, Congress was fully aware of concerns raised by the programming industry about the relationship of retransmission consent and copyright. Congress concluded that the two provisions would function together, as retransmission consent and copyright provisions have coexisted in other contexts since 1927. The Commission should not expend its limited resources in resurrecting this debate and certainly must not attempt to graft rights of copyright owners onto the communications law provisions of the Cable Act.

II. CHANNEL CAPACITY/NUMBER OF SUBSCRIBERS

The Act generally requires cable systems to devote up to one-third of their channel capacity for the carriage of commercial must carry signals, but creates exceptions for: 1) systems with twelve or fewer activated channels which need carry only three must carry signals; and 2) twelve or fewer channel systems with 300 or fewer subscribers which are exempt from must carry requirements so long as they do not delete carriage of any broadcast television stations. The Commission seeks guidance on the implementation of these provisions.

NAB believes that the appropriate date for determining what television stations must continue to be carried by systems with fewer than 300 subscribers to remain eligible for their exemption is October 5, 1992, the date the Act was enacted. Any later date would permit a small cable system to drop stations which it may have carried historically and avoid any regulation, a result inconsistent with Congress' intent.

To establish what cable systems are eligible for these exemptions, and to assist in determining the number of channels which each system must devote to must carry stations, NAB urges that each cable system be required to file a certification with the Commission within 60 days after the effective date of the new rules, and that such certifications be served on each television station that is eligible for must carry on the system.[2/] The certification should include the number of usable activated channels on the system on the date it is submitted; if applicable, that the system has 300 or fewer subscribers; and the call signs of the stations it is carrying in fulfillment of its must carry obligations (*see* § 614(b)(8) of the Act). In the event that a system changes its channel capacity or the number of its subscribers such that modifications in its carriage obligations will result, notices should be filed with the Commission and served on all affected television stations within 60 days after the change occurs. These notice provisions parallel the Commission's analogous rules that apply when small cable systems become ineligible for exemptions from the network nonduplication and syndicated exclusivity rules. *See* §§ 76.95(a) and 76.156(b).

Any station whose carriage rights may be affected by changes in a cable system channel capacity or the number of its subscribers should be entitled to change its must carry/retransmission right election with respect to that cable system within 60 days after receiving notice of the change. For example, if a twelve channel cable system in a station's ADI is not carrying the station because there are more than three

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2/ Systems with 300 or fewer subscribers should also serve notices on all television stations they were carrying on October 5, 1992.

must carry eligible stations in the ADI, or if the station is being carried pursuant to retransmission consent because it is not one of the three stations designated by the cable system as a must carry signal, and the cable system subsequently increases its channel capacity, such station should be allowed to renew its must carry election.

III. NOTICES RE: MUST CARRY STATIONS NOT VIEWABLE WITHOUT A CONVERTER

Paragraph 16 of the *Notice* seeks comment on implementation of the Act's requirement that cable systems not providing connections to all of a subscriber's television receivers notify the subscriber of all broadcast signals which cannot be viewed on the system without a converter.

NAB recommends adopting notice requirements similar to those contained in the Commission's former input selector switch and consumer education requirements (*See* § 76.66 of the Commission's rules which the Act repealed). First, within 60 days after the new must carry rules become effective, all cable operators who allow their subscribers to install additional receiver connections on their own, without providing them with the necessary equipment, should send the requisite notice containing a list of nonviewable signals to all their subscribers. Second, such cable systems should provide the notice to all new subscribers. Third, a list of such stations should be provided to all subscribers at least on an annual basis.

IV. DEFINITION OF A LOCAL COMMERCIAL TELEVISION STATION

Paragraph 17 of the *Notice* seeks comment on various aspects of the definition of a local commercial television station, the definition of stations eligible for must carry.

A. Compliance With Distant Signal Copyright Requirement

One element of that definition is that a full power commercial television station is *not* eligible for must carry on a cable system in its market if, with respect to that system, it is a distant signal under the Copyright Act, *unless* the station agrees to indemnify the cable system for any increased copyright liability incurred as a result of its being carried. Establishing whether a station is a distant signal under the Copyright Act requires a determination of whether the signal was a must carry signal under the Commission's must carry rules in effect on April 15, 1976. These "pre-*Quincy*" rules were rather complex, and have become virtually inaccessible except to those few who retain archival libraries of the Commission's deleted regulations.

Because of the renewed importance of these old must carry rules to the new must carry regime, and to provide a public service both to the private bar and, more importantly, to stations and cable operators, NAB urges the Commission to include, either in its new must carry rules, or in a note thereto, those provisions of the old must carry rules necessary to determine the copyright status of a particular station.

B. Compliance With the "Good Quality Signal" Requirement

To be considered a "local commercial television station" with respect to a cable system, a broadcaster must deliver a specified signal level to the input terminals of the signal processing equipment at the principal headend.[3/] However, whether or not this level is delivered will depend upon a host of factors unique to each cable

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3/ For VHF stations, the required level is -45 dBm while UHF stations must provide -49 dBm. Section 614(h)(1)(B) of the Act.

installation. These include the type and quality of the antenna used by the cable operator, the location of the antenna, whether the antenna is installed properly, and the amount of attenuation or amplification present in the system between the antenna and the signal processing equipment. Because of the wide variety of circumstances which may apply, "good engineering practices" should be the guide for assessing whether a cable operator has undertaken reasonable efforts to receive the broadcast signal.

C. The Location of a Cable System's Headend and Whether it is Technically Integrated Are Irrelevant To Defining a Local Commercial Television Station

The most significant and potentially troubling issue raised in paragraph 17 of the *Notice* are questions raised concerning the bases for determining the location of a cable system for purposes of the must carry rules. Specifically, paragraph 17 asks whether a cable system's principal headend should be the basis for determining its location, and other questions are raised in both paragraphs 17 and 18 concerning single "technically integrated systems" that may serve communities in more than one ADI. Both the provisions of the Act and the relevant legislative history admit but one answer to these questions. If a given *community* is located in whole or in part within a station's ADI or local market as otherwise defined by the Commission, the cable system serving that *community* is required to carry all must carry stations within the ADI in which that community is located. The location of the system's principal headend is simply irrelevant, as is the cable operator's decision as to how it has chosen technically to integrate its systems.

Section 614(b) of the Act imposes requirements on "cable systems" to carry a specified number of "local commercial television stations." Section 522(b) defines a "cable system" as being a "facility... designed to provide cable service which includes video programming and which is provided to multiple subscribers *within a community*." (emphasis supplied). Section 614(h)(1) provides that "a local commercial television station 'is must carry eligible on any' particular cable system [that] is within the same television market." Section 614(h)(1)(c) generally defines a station's market as its ADI, but allows the Commission to make certain adjustments in the market by including or excluding certain "communities" served by the cable system, in order to better tailor must carry obligations to Congress' objective.

According to the Act's legislative history, "Congress' objective" in establishing the areas in which stations were entitled to must carry rights was "to ensure that television stations be carried in the areas which they serve and which form their economic market. The FCC also may determine that certain *communities* are local to more than one television market. . .."[4/] Congress chose a station's ADI as the basis for its must carry zone, primarily because the ADI generally "encompasses the area in which most television stations would be considered local and is the area to which most television stations' public service programming is directed."[5/] It also chose the ADI, in part, because that is the area in which stations are "most likely to compete

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4/ H.R. REP. No. 628, 102d Cong., 2d Sess. 97 (1992) (emphasis supplied).

5/ *Id.* at 66.

with the cable system for local advertising and thus the stations which the cable system has the greatest incentive to drop from carriage."[6/]

The above-referenced statutory language and accompanying legislative history makes it unequivocally clear that a station's must carry rights are not dependent on the vicissitudes of where a cable system chooses to locate its principal headend[7/], or whether or how it chooses technically to integrate its system.[8/] Consideration of such factors would only invite mischief and manipulation in constructing systems. The *only* appropriate inquiry is whether a given *community* which a cable system is authorized to serve is part of a station's local market.[9/] If it is, the station is entitled to carriage as part of the basic tier offered to subscribers in the community.[10/]

6/ *Id.*

7/ Indeed, the House Energy and Commerce Committee commented that "ADI lines . . . more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition." *Id.* at 97.

8/ Potential technical difficulties that could arise from situations where a single cable headend serves multiple communities in different ADIs would appear no different than those presented where a single headend serves multiple areas, some of which are subject to a station's network nonduplication and/or syndicated exclusivity requests, and others which are not. Yet the Commission has never suggested such potential problems affect a cable operator's obligations. In such circumstances, the cable operator has the option of simply carrying the station both in areas where it is and is not entitled to must carry or technically reconfiguring its system.

9/ In a related context, the Commission's network nonduplication and syndicated exclusivity rules focus on "cable communities" both with respect to protection afforded and exceptions to such protection. *See* §§ 76.92, 76.151, 76.156.

10/ Comments filed in this proceeding by Standard Tobacco Company reflect an unfortunate misunderstanding of the must carry provisions of the Cable Act. Under the Act, cable systems are required to carry the signals of commercial

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V. DEFINITION OF A TELEVISION MARKET

The Act provides that the starting point for determining the area within which a local commercial television station is entitled to assert must carry rights is its ADI. The Commission seeks comment on how changes in ADI configurations should be accommodated.

NAB recommends that this issue should not be viewed in isolation. Rather, it should be considered in the context of the more global question of how to fashion the triennial must carry/retransmission consent election process. Inherent in Congress' decision to allow commercial television stations to elect between must carry and retransmission consent only every three years was the recognition that both stations and cable operators need a degree of stability and certainty with respect to what stations a system will carry and the terms and conditions of such carriage. It is also clearly important to all parties that, to the extent possible, they know in advance of negotiating over carriage what the regulatory landscape will be for the ensuing three years, and that changes in the landscape will be kept to a minimum.

To assist in accomplishing these objectives, NAB recommends that both ADI designations and the Commission's list of markets contained in section 76.51 of its rules be established in advance of the three-year election cycle and remain applicable

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[10/](...continued)

television stations within their ADIs. Nothing, however, in the must carry provisions prevent a cable system from carrying the signal of a station located outside of its ADI. Contrary to Standard Tobacco, its cable systems will not be barred from carrying stations from both Cincinnati *and* Lexington, Kentucky, as those cable systems claim to have done in the past.

during the three-year term that the elections are in effect. With specific reference to changes in ADI designations, it is NAB's understanding that Arbitron announces any such changes in June of each year. Accordingly, we recommend that ADI boundaries established in June of the year in which elections are made generally determine the area within which a station can exercise its must carry option for the following three years.[11/] Thus, for example, if one year into its must carry election Arbitron modified a station's ADI to exclude a county, the station would continue to have its must carry rights honored on cable systems in that county for the full three year term of its election. Similarly, if a county were added to a station's ADI in year one, the station would not have must carry rights on cable systems in that county until the next election cycle.

Another issue raised concerning the definition of television markets is how to define such markets in Alaska and Hawaii where Arbitron has not created ADIs. It is NAB's understanding that Nielsen has established DMAs in these states which would appear to be logical starting points for defining the markets of Alaska and Hawaii stations.

Concerning the question of how best procedurally to process requests to add or delete communities from a station's market, NAB concurs with the Commission's initial assessment that the simplified special relief provisions of Section 76.7 would

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11/ Any changes in ADI boundaries would not affect Commission determinations made pursuant to a station or cable system waiver petition under section 614(h)(k) of the Act that specific communities are, or are not, to be included in a specific station's local market.

best satisfy the Act's mandate that such requests receive expeditious consideration. The Commission may, however, wish to clarify and/or modify some of the specific provisions of Section 76.7 as it relates to these requests.

First, clarification may be desirable under Section 76.7(b) with respect to the categories of "interested person[s]" who must be served with special relief petitions. For example, a cable operator seeking to transplant a community from one ADI to another ADI should be required to serve all stations assigned to both.

Second, the public interest would be served by, at least temporarily, waiving any required fees in connection with filing special relief petitions relating to modifications to a station's local market. As the Commission is acutely aware, the Act requires parties affected by it to focus on a plethora of issues and concerns in a very narrow time frame. While some parties may have the time and resources to request that specific communities be included in or excluded from the ADIs where they are located in comments in this rulemaking (thereby not paying a filing fee), others may not. The Commission may also be required to process a considerable number of such petitions prior to or shortly after the commercial station must carry provisions go into effect. The extra steps required in filing and processing fees could delay expeditious consideration of these petitions. Finally, even as Congress adopted the ADI as the area within which stations generally could assert must carry rights, it realized that this scheme could create anomalies that the Commission would, at the outset, have to reconcile with the objectives of the Act. It would appear reasonable not to require

parties to pay about $800 a petition to assist the Commission in this initial adjustment process.

Third, the provision of section 76.7(2) requiring that petitions for special relief "set forth all steps taken by the parties to resolve the problem" would not appear applicable to petitions to add or delete communities from a station's local market.

Another issue raised in the *Notice* with respect to "community waiver" petitions is whether, or to what extent, the Commission should, in considering such petitions, adopt more specific or additional criteria to those provided for in the Act. Specifically, comment is sought on whether: 1) a mileage limit should be created that would establish a presumption for or against a given community being included in a station's market; and 2) a standard relating to a station's over-the-air viewability, such as its being "significantly viewed", should be adopted to assess whether a given community is, or is not, in the station's local market.[12/]

NAB submits that any Commission-imposed mileage limitation within a station's ADI that would create a presumption against a community within the ADI being considered as part of a station's local market would violate the Act.[13/] The

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12/ In considering policies relating to the "waiver" process in the Act, the Commission should keep in mind that Congress intended that stations generally have must carry rights across their ADIs. The waiver provisions are designed to address anomalies which would occur with the use of any definition, but they are not an invitation to wholesale revision of television markets, particularly if such requests would have the effect of reducing the area where a station's signal can be seen.

13/ It also might lead to cable systems claiming that they were not part of any television market. That result would not be in keeping with Congress' objec-

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Commission's post-*Quincy* rules, the commercial station must carry provisions of S.12 as adopted by the Senate Commerce Committee, and the must carry provisions of the Act relating to noncommercial stations all included mileage criteria, evidencing Congress' clear awareness of the existence of the mileage option as a means of defining a station's market. Not only did Congress choose not to adopt a mileage criterion, it specifically rejected that factor. The Senate bill was amended on the floor to establish ADI lines as the delineation for stations' must carry rights. The House bill as reported from committee also specified that ADI boundaries would establish stations' must carry rights, subject only to special modification in particular circumstances. "The Committee believes that ADI lines are the most widely accepted definition of a television market, and more accurately delineate the area in which a station provides local service *than any arbitrary mileage-based definition.*"[14/] The House must carry provision was the basis for the provision in the Cable Act.[15/] The fact that Congress specifically *rejected* mileage as a criteria in determining local markets precludes the Commission for readopting it in its rules or policies.

Similarly, with respect to viewability, the Congress has also rejected over-the-air viewability as a dispositive factor in determining must carry status. Section

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[13/](...continued)
tive of ensuring that cable subscribers receive the benefits of local television service. *See, e.g.*, H.R. REP. No. 628, 102d Cong., 2d Sess. 64 (1992). The Commission should not accept petitions which would lead to a particular cable system becoming entirely exempt from any must carry obligations.

[14/] H.R. REP. No. 628, 102d Cong., 2d Sess. 97 (1992) (emphasis supplied).

[15/] H.R. REP. No. 862, 102d Cong., 2d Sess. 74 (1992).

614(h)(1)(B)(iii) of the Act establishes specific signal levels at the cable system head-end as prerequisites for must carry status. It further specifies that if a station otherwise eligible for carriage on a cable system does not provide an over-the-air signal meeting such standards, it may instead provide the cable system with a baseband video signal or otherwise assume the cost the cable system will incur to obtain a good quality signal. Certainly, this provision would stand in contradiction to any notion that the Commission should impose an over-the-air viewability standard as a test for whether any station should retain its must carry status on a cable system in the same ADI.

To the extent that the location of a cable system with respect to a television station and a station's signal propagation characteristics may be relevant to a determination whether a particular cable community is part of a station's television market, those factors are already incorporated into the factors set forth in section 614(h)(1)(C)(ii). If a station is so distant from a cable system that it could not be reasonably deemed to be in the same television market, it will not be likely that the station and other stations in its area will have been historically carried on that cable system. Similarly, it would be unlikely that the station would have provided local service to such a distant community, or that the viewing patterns in the distant community would reflect a tie with the station's community of license. The Commission, therefore, need not and should not attempt to graft new criteria onto the standards which Congress specified, particularly in the absence of any experience

handling requests for changes in television markets and where the proposed additional criteria merely recapitulate the content of existing standards.

The Commission also asked (*Notice* ¶ 20 n. 22) whether the fact that a station is "significantly viewed" in a community could be used in making determinations under the fourth criterion specified by Congress -- "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community." Section 614(h)(1)(C)(ii)(IV). While such status *may* be relevant in concluding that a given community *is* within a station's local market, it is not necessarily relevant in determining that a community is *not* within a station's local market.

First, it is significant that while both the Commission's *post-Quincy* must carry rules and subsequent cable bills introduced in Congress prior to passage of the Act included viewing standards approximating the Commission's significant viewing criteria, in the Act itself Congress chose not to employ a viewing standard. This was due, in part, to the fact that new and specialty stations that actually served, and were part of a local market, might be excluded from must carry eligibility because they failed to meet the viewing standard. Hence, while it may be true that significantly viewed status provides evidence that a specific community is part of a station's market, the converse is not necessarily true.

Second, the Commission's significantly viewed standard is based on viewing levels in non-cabled homes, while the Act specifies that viewing patterns in both cabled and non-cabled homes must be considered in "community waiver" petitions.

Hence, for example, while a station seeking to maintain a community in its ADI against a challenge that the community should be removed from its local market could properly cite to its significantly viewed status, the fact that the station is not significantly viewed is not determinative of whether the community should be excluded because viewing patterns in cabled homes in the community must also be considered.

Third, the Commission's list of significantly viewed stations is based upon an amalgam of county-wide and community specific determinations, some of which date back to 1970. Hence, the fact a station is not listed as being significantly viewed based upon county-wide data does not necessarily mean that it is not significantly viewed in specific communities within that county,[16/] nor does the fact that a station was not significantly viewed in 1970 mean that it is not currently significantly viewed.[17/] However, the ability to use significantly viewed status to address one of the factors established by Congress for the Commission to consider in determining whether to include a non-ADI community within the station's market could reduce the cost of filing such a request for stations and reduce the burden on the Commission of

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16/ In adopting its original list of counties in which stations were significantly viewed, the Commission acknowledged that "[b]ecause this data is provided on a county-wide basis only, we recognize that it may not account for variations in viewing levels among communities within the county". *Cable Television Report and Order*, 36 FCC 2d 143, 175 (1972) (hereinafter "*Cable Report and Order*").

17/ While § 76.54 of the Commission's rules provides a mechanism for updating a station's significantly viewed status, it often requires commissioning expense and time consuming community-by-community surveys.